Chandrasekaran Thangavelu & Anor v AL Annamalai & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO M–02–465 OF 1999

ARIFIN ZAKARIA, HASHIM JJCA AND AZMEL J

14 MAY 2004

Civil Procedure — Appeal — Right of appeal — Adoption order made by High Court — Whether can appeal against adoption order — Whether appeal lies only from High Court's refusal to make adoption order — Whether exist right of appeal to Court of Appeal or Federal Court — Adoption Act 1952 ss 22, Courts of Judicature Act 1964 s 67

Family Law — Children — Adoption — Adoption application allowed in High Court — Whether right to appeal lies only from High Court's refusal to make adoption order — Whether exist right of appeal to Court of Appeal or Federal Court — Adoption Act 1952 ss 22, Courts of Judicature Act 1964 s 67

There were two applications filed in the High Court, one by the natural parents ('the appellants') for a writ of habeas corpus and another by the respondents, the adoptive parents ('the respondents') for the legal adoption of a child pursuant to the Adoption Act 1952 ('the Act'). The adoption application was heard first in favour of the respondents and the habeas corpus application was dismissed. Dissatisfied with the decision, the appellants appealed to the Court of Appeal. At the hearing of this appeal, the respondents raised two preliminary objections before considering the merit of the appeal, ie: (i) whether an appeal lies to the Court of Appeal only from a refusal of the High Court to make an adoption order; and (ii) whether an appeal lies in the Court of Appeal or to the Federal Court by virtue of s 22 of the Act.

Held, striking out appeal with costs:

(1) Section 22 of the Act on its plain reading only conferred the right of appeal in cases where the adoption application was refused by the High Court and not otherwise. In the present case since the application for adoption was allowed by the High Court, no appeal should lie against the said decision. Even though there seem to be a lacuna in the Act, it was not for this court to remedy the same but the legislature (see para 10).

(2) Section 67(1) of the Courts of Judicature Act 1964 confers jurisdiction on the Court of Appeal to hear appeals from any judgment or order of any High Court in any civil cause or matter. However, this broad power is subject to any written law regarding the terms and conditions upon which such appeals shall be brought. The applicable law in the context of the present appeal is the Act which by s 22 curtails the right of appeal to cases where the application for adoption had been refused by the court (see para 12).

(3) If at all an appeal should lie from the decision of the High Court then the appeal should lie to the Federal Court as provided in s 22 of the Act and not to the Court of Appeal (see para 15).

[**Bahasa Malaysia summary**

Dua permohonan telah difailkan di Mahkamah Tinggi, satu oleh ibu bapa kandung ('perayu-perayu') untuk satu writ habeas corpus dan satu lagi oleh responden-responden, ibu bapa angkat ('responden-responden') untuk pengambilan anak angkat secara sah seorang kanak-kanak menurut Akta Pengangkatan 1952 ('Akta tersebut'). Permohonan anak angkat tersebut yang telah didengar dahulu berpihak kepada responden-responden dan permohonan habeas corpus tersebut telah ditolak. Berasa tidak puas hati dengan keputusan tersebut, perayu-perayu telah merayu ke Mahkamah Rayuan. Semasa perbicaraan rayuan ini, responden-responden telah menimbulkan dua bantahan awal sebelum menimbangkan merit rayuan, iaitu: (i) sama ada satu rayuan terletak di Mahkamah Rayuan hanya selepas Mahkamah Tinggi menolak untuk membuat satu perintah pengambilan anak angkat; dan (ii) sama ada satu rayuan terletak di Mahkamah Rayuan atau Mahkamah Persekutuan menurut s 22 Akta tersebut.

Diputuskan, membatalkan rayuan dengan kos:

(1) Seksyen 22 Akta tersebut jika dibaca sekali lalu hanya memberikan hak untuk membuat rayuan dalam kes-kes di mana permohonan pengambilan anak angkat ditolak oleh Mahkamah Tinggi dan bukan sebaliknya. Dalam kes semasa memandangkan permohonan pengambilan anak angkat telah dibenarkan oleh Mahkamah Tinggi, tiada rayuan boleh dibuat terhadap keputusan tersebut. Meskipun terdapat lacuna dalam Akta tersebut, ia bukanlah untuk mahkamah ini mencari remedinya tetapi badan perundangan (lihat perenggan 10).

(2) Seksyen 67(1) Akta Mahkamah Kehakiman 1964 memberikan bidang kuasa kepada Mahkamah Rayuan untuk mendengar rayuan-rayuan daripada mana-mana penghakiman atau perintah mana-mana Mahkamah Tinggi dalam kausa atau tindakan sivil. Namun begitu, kuasa luas ini tertakluk kepada undang-undang bertulis berkaitan terma-terma dan syarat-syarat yang mana rayuan-rayuan tersebut dimulakan. Undang-undang yang digunakan dalam konteks rayuan semasa adalah Akta tersebut di mana s 22 menghalang hak untuk membuat rayuan di mana kes-kes adalah berkaitan permohonan pengambilan anak angkat yang telah ditolak oleh mahkamah (lihat perenggan 12).

(3) Jika pun terdapat suatu rayuan daripada keputusan Mahkamah Tinggi maka rayuan tersebut hendaklah dimulakan di Mahkamah Persekutuan sebagaimana diperuntukkan dalam s 22 Akta tersebut dan bukan diMahkamah Rayuan (lihat perenggan 15).]

Notes

For cases on adoption, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2705–2723.

For cases on the right to appeal, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1177–1185.

Cases referred to

Auto Dunia Sdn Bhd v Wong Sai Fatt [1995] 2 MLJ 549 (refd)
Benson v Northern Ireland Road Transport Board [1942] AC 520 (refd)
Capital Insurance Bhd v Aishah bte Abdul Manap & Anor [2000] 4 MLJ 65 (refd)
TPC v ABU & Anor [1983] 2 MLJ 79 (refd)
Thow Seng Yeap, Re; Thow Chow Goon & Anor v Khor Kar Chooi & Anor [1989] 3 MLJ 482 (refd)
United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah & other applications [2003] 1 MLJ 465 (refd)

Legislation referred to

Adoption Act 1952 ss 22, 25(6)
Adoption Act 1958 s 10(4), (5) [UK]
Courts of Judicature Act 1964 ss 4, 33, 35, 67(1)

Manjit Singh (Rozeka Md Kamdari with him) (A Zahari & Rakan-Rakan) for the appellants.
Balwant Singh Sidhu (Balwant Singh Sindhu & Co) for the respondents.

Arifin Zakaria JCA (delivering judgment of the court):

THE APPEAL

[1] In this case, there were two applications filed in the High Court, namely Originating Motion No 25–13 of 1998 filed by the natural parents ('the appellants') for a writ of habeas corpus, and Originating Summons No 24–30 of 1999 filed by the adoptive parents ('the respondents') asking for the legal adoption of the child named Joyce Kala Vandaiyar ('Joyce') pursuant to the Adoption Act 1952 ('the Act'). It was agreed at the outset that the adoption application be heard first and the application for the writ of habeas corpus to follow the outcome of the adoption application. The learned judge made an order in terms of the adoption application and hence dismissing the habeas corpus application. The appellants being dissatisfied with the said decision now appeal to this court.

BRIEF FACTS

[2] The facts leading to this application are briefly as follows. The child, Joyce, who is at the centre of the dispute, was born on 5 September 1991. She was placed in the care of her grandmother immediately upon discharge from hospital. Six months later when the grandmother left for India the appellants placed her in the care of the first and second respondents. The second appellant and the second respondent are sisters. The second appellant vide letter dated 9 April 1996 (exh A3), acknowledged the fact that the respondents had been the guardian and foster parents of the child since May 1992. In the same letter, she also acknowledged that she was in full agreement with any decision taken by the respondents regarding Joyce's education/

schooling and overall well-being. However, in their affidavit in reply affirmed on 2 February 1999, the appellants categorically denied that they had de facto given Joyce for adoption by the respondents. They claimed that they merely intended that the respondents look after the said child during their matrimonial differences and that they never intended to surrender their parental rights to the respondents. In the paramount welfare and best interest of the said child and in their best interest as natural parents, they prayed that the application by the respondents be refused.

[3] For the reasons stated in the grounds of judgment, the learned judge allowed the respondents' application. At the hearing of this appeal, the learned counsel for the respondents raised two preliminary objections. We were asked to decide on these preliminary objections before considering the merit of the appeal. We now deal with these preliminary objections.

THE PRELIMINARY OBJECTIONS

Whether an appeal lies to this court where an application for adoption was allowed by the High Court

[4] It is trite law that a right of appeal is a creature of statute. For authorities, see *Benson v Northern Ireland Road Transport Board* [1942] AC 520, at p 575; *TPC v ABU & Anor* [1983] 2 MLJ 79, *Capital Insurance Bhd v Aishah bte Abdul Manap & Anor* [2000] 4 MLJ 65 at p 68; *Auto Dunia Sdn Bhd v Wong Sai Fatt* [1995] 2 MLJ 549. In the present case, the right of appeal is founded upon s 22 of the Act which reads:

> An appeal shall lie to the Federal Court or to the High Court *from any refusal* of the High Court or a Sessions Court, as the case may be, to make an interim order or an adoption order. (Emphasis added.)

[5] The learned counsel for the respondents contended that the said section merely provides that an appeal would lie against the decision of the court of first instance only where it had refused to make an interim order or an adoption order, and by necessary implication no appeal shall lie against the decision of the said court when an adoption order was made by the court as in the present case. On that premise, he contended the appeal herein is not a competent appeal and should be dismissed in limine.

[6] The contention of the learned counsel for the respondents found support in the decision of one of our eminent judges, Edgar Joseph Jr J (as he then was) in *TPC v ABU & Anor*. In that case, the same issue came for consideration of the court. There, the court held that as the impugned order was one approving an application for adoption no appeal lies. In his grounds of judgment, his Lordship considered s 10 of the Adoption Act 1958 in England together with ss 22 and 25(6) of the Act in coming to his decision. The relevant part of the judgment reads:

> In England s 10 of the Adoption Act 1958 provides as follows:
>
> > 'Where, on an application made in England to a magistrates' court, the court makes or refuses to make an adoption order, an appeal shall lie to the High Court.'

In this country, ss 22 and 25(6) of the Act provide as follows:

> '22 An appeal shall lie to the Federal Court or to the High Court from any refusal of the High Court or a Sessions Court, as the case may be, to make an interim order or an adoption order.
>
> 25(6) Where an adoption order is quashed, or an appeal against an adoption order allowed, the Court which made the order shall give directions to the Registrar-General to cancel any marking of an entry in the Registers of Births and any entry in the Adopted Children Register which was effected in pursuance of the order.'

It is true that s 25(6) suggests that appeals do lie against orders approving an application for adoption. In my view, however, this subsection merely confers powers on the Court concerned to make consequential orders addressed to the Registrar-General of Births and Deaths whereas s 22 is a specific provision which gives the right of appeal and there being an apparent conflict between the two provisions, the latter overrides the former.

I therefore hold that as the impugned order was one approving an application for adoption, no appeal lies. The appeal is therefore dismissed in limine.

[7] Having said that, the learned judge then went on to consider the merits of the matter before him by way of revision pursuant to the provisions of ss 33 and 35 of the Courts of Judicature Act 1964 ('the CJA'). Needless to say, that this court has no similar power under the CJA.

[8] Mr Manjit Singh, learned counsel for the appellant submitted that the case of *TPC v ABU & Anor* was wrongly decided because the learned judge failed to consider s 10 of the Act which clearly provides that an appeal lies from the decision of a learned judge. Section 10(1) of the Act confers jurisdiction either on the High Court or at the option of the applicant any sessions court to make adoption orders. Section 10(4) and (5) then goes on to provide that:

> 10(4) The President of a Sessions Court may if he thinks fit submit any question of law, practice or procedure in connection with any application for the decision of a Judge of the High Court and if he does so he shall decide such question in conformity with such decision. (Added Ord 35/53)
>
> 10(5) An appeal shall lie to the Federal Court from any decision of a Judge under this section.

[9] Thus, it would appear that the right of appeal in s 10(5) is only confined to a decision made by the judge of the High Court on any question of law, practice or procedure submitted to him by a sessions court under s 10(4) of the Act. We are fortified in our view by the use of the words 'from any decision of a judge under this section'. The words 'this section' here clearly mean s 10 of the Act and not any other section. The instant appeal could not come under s 10(5) of the Act.

[10] The learned counsel further argued that the interpretation given by the court in *TPC v ABU & Anor* if followed by this court would work injustice on the natural parents. He also contended that the finding of the learned judge in that case goes against the Federal Court's decision in *Re Thow Seng*

Yeap; Thow Chow Goon & Anor v Khor Kar Chooi & Anor [1989] 3 MLJ 482. In that case, the natural parents appealed to the Federal Court against the decision of the High Court in allowing an adoption application. There, the Federal Court reversed the order of the learned High Court judge and ordered that the infant be returned to the natural parents. Based on that authority, he submitted that appeals lie to this court from the decision of the High Court. With respect, we find that in *Re Thow Seng Yeap*, the issue raised herein pertaining to the right of appeal under s 22 was not at all canvassed before the Federal Court. Therefore, to that extent this court is not bound by that decision. In the circumstances, therefore, it falls upon us to give a judicial interpretation on s 22. Having considered the matter, we agree with learned counsel for the respondents that s 22 on its plain reading only confers the right of appeal in cases where the adoption application was refused by the High Court and not otherwise. In the present case since the application for adoption was allowed by the High Court, we hold that no appeal lies against the said decision. However, we agree with appellants' counsel that there seems to be a lacuna in the Act as it presently stands, but it is not for this court to remedy the same. It is a matter falling strictly within the purview of the legislature.

[11] Our attention was also drawn to the provision of s 67(1) of the Courts of Judicature Act 1964 ('the CJA') which reads:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought.

[12] This section confers jurisdiction on the Court of Appeal to hear appeals from any judgment or order of any High Court in any civil cause or matter. However, this broad power is subject to any written law regarding the terms and conditions upon which such appeals shall be brought. The applicable law in the context of the present appeal is the Act which by s 22 curtails the right of appeal to cases where the application for adoption had been refused by the court. For the above reasons, we are of the view that s 67(1) of the CJA is also of no avail to the appellants.

Whether an appeal lies to this court or to the Federal Court

[13] The second issue is whether appeals lie to this court or to the Federal Court. Section 22 provides that an appeal shall lie to the Federal Court or to the High Court from any refusal to make an adoption order by the High Court or the sessions court as the case may be. Learned counsel for the appellants submitted that there is a conflict between s 22 of the Act and s 67 of CJA and since the Act had been in force prior to the CJA, therefore, by virtue of s 4 of the CJA the provisions of the CJA will prevail. Hence, the appeal in the present case, if at all there is a right of appeal, should properly be to the Court of Appeal and not to the Federal Court.

[14] To put the issue in perspective, it is not disputed that when the CJA came into force in 1964 the Act was already in force. At that point of time, there is no inconsistency or conflict between the CJA and the Act. The inconsistency or conflict only arose after the amendment to the CJA under Act A886 which came into force on 24 June 1994, which provides that the Court of Appeal shall have jurisdiction to hear appeal from any judgment or order of the High Court. Abdul Malek Ahmad FCJ in *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah & other applications* [2003] 1 MLJ 465 had considered the effect of s 4 of CJA and he said at p 476:

> Section 4 of the CJA states:
>
> 'Provision to prevent conflict of laws
>
> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.
>
> The crucial words of that section appear to be 'in force at the commencement of this Act' meaning that the inconsistency or conflict with any other written law should be at the point of time when the CJA was enacted and not subsequently.'

[15] So for s 4 of the CJA to apply, the inconsistency or conflict must exist as at the date the CJA came into force, ie in 1964 and not after that date. In the present case, the apparent inconsistency or conflict only arose when Act A886 came into force on 24 June 1994. Therefore, s 4 of the CJA has no application to the present case. For these reasons, we hold that, if at all an appeal should lie from the decision of the High Court, which we hold otherwise, then the appeal would lie to the Federal Court as provided in s 22 of the Act and not to this court.

[16] For the above reasons, we agree with the preliminary objections raised by the learned counsel for the respondents and hold that there is no competent appeal before us and order that the appeal be struck out with costs. Deposit to respondents towards account of taxed costs.

Appeal struck out with costs.

Reported by Ezatul Zuria Azhari